No.

In the Supreme Court of the United States

BRIAN S. COLLIER,

Petitioner,

v.

GARY HARROLD AND CAROL HARROLD,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Are Ohio statutes § 3109.11 and § 3109.12 unconstitutional in that they infringe on a parent's fundamental right to make decisions concerning the care, custody and control of one's child, which is protected by the due process clause of the Fourteenth amendment to the United States Constitution?

2. Do Ohio statutes § 3109.11 and § 3109.12 violate the holding outlined in *Troxel v. Granville* (2000), 53 U.S. 57 by:

    A. Violating the presumption that a fit parent's decision on visitation is in the child's best interest;

    B. Violating the "special weight" requirement of *Troxel* to the wishes of the parent in determining whether to allow visitation to a non-parent

3. What is the precise scope of the parental due process right in the visitation context?

RULE 14.1b STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

In the Supreme Court of Ohio:

Appellees: The Estate of Renee Harrold, Gary Harrold and Carol Harrold represented by Jackwood Law Offices, Rosanne K. Shriner and Renee J. Jackwood, 132 East Liberty Street, Wooster, Ohio 330-264-2216

Appellant: Brian S. Collier
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RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, BRIAN S. COLLIER, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINION BELOW

The Opinion of the Supreme Court of Ohio (App., Infra pp. 1a-17a) is known as Harrold v. Collier, and reported at 107 O.St.3d 44, 836 N.E.2d 1165 and is found in the appendix herein at pages 1a-17a. The Opinion of the Ohio Court of Appeals, Ninth Judicial District (App., Infra pp. 18a-32a) is reported as 2004-OHIO-4331 and is found in the appendix herein at page 18a-32a. The original trial court decision is not reported, is known as the Estate of Renee Harrold, Plaintiff v. Brian S. Collier, Defendant v. Gary Harrold and Carol Harrold, Third-Party Defendants, Case No. 97 1440 PAR, ID No. 32043 and is found in the appendix of the Petition (App., Infra pp. 33a-44a). The Magistrate's Opinion is not reported and is found in the Appendix at page 46a-51a.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 10, 2005. This appeal is filed pursuant to the authority of 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves an interpretation of three Ohio statutes: R.C. § 3109.11; R.C. 3109.12; and R.C. § 3109.051. All

three statutes are lengthy and all three are set out in the appendix:

R.C. § 3109.11 at pages 52a-53a
R.C. § 3109.12 at pages 54a-56a
R.C. § 3109.051 at pages 56a-73a

STATEMENT OF THE CASE

Renee Harrold and Petitioner shared a relationship and had a daughter, Brittany Renee Collier, born on July 28, 1997. That same year, paternity was established and Petitioner began paying support.

The child and her mother resided with the mother's parents, Gary and Carol Harrold, Respondents herein. There was much litigation between Petitioner and Renee Harrold during the child's first years. That litigation involved visitation between Petitioner and his daughter and other issues, however, on October 10, 1999, Renee Harrold, succumbed to cancer. Following Renee's death, Gary and Carol Harrold were granted temporary custody of the child. A great deal of litigation again ensued between the Petitioner and Gary and Carol Harrold regarding visitation, payment of medical expenses and other issues. Hearings were held, decisions made and decisions appealed. On Petitioner's motion the trial court awarded custody of Brittany to Petitioner. Gary and Carol Harrold appealed but the appeal was denied and Petitioner gained custody of his child (App., Infra p. 47a). Respondents filed a motion for grandparent visitation rights of Brittany. A hearing was held and the Magistrate granted the grandparents visitation (App., Infra p. 50a). The Petitioner appealed to the Judge from the Magistrate's Decision, which appeal was granted (App., Infra p. 44a).

The Harrolds appealed to the Ohio Ninth District Court of Appeals. The Court of Appeals reversed the Juvenile Court's dismissal of Appellees' motion for visitation (App., Infra p. 32a).

Petitioner appealed to the Supreme Court of Ohio, which Court affirmed the judgment of the Court of Appeals (App., Infra p. 17a), and remanded the case.

Petitioner takes this appeal from the Opinion of the Supreme Court of Ohio.

RULE 14(1)(g)(i) STATEMENT LOWER COURT RULINGS

(A) The trial court

Petitioner opposed visitation for the Harrolds from the very moment he acquired custody of his child. The findings of fact of the Magistrate in the original motion hearing in May of 2003 indicate "Brian Collier is opposed to grandparent visitation for Gary and Carol Harrold" (App., Infra p. 48a). The Magistrate found that the "actions of Brian Collier have not been in the best interest of his daughter, Brittany Collier" (App., Infra p. 50a) and the Magistrate granted the visitation.

In the appeal to the juvenile Judge, the court's order states "The father, Brian Collier, has made it perfectly clear that he does not wish visitation between Brittany and the grandparents." (App., Infra p. 40a). The Court went on to say that his (Petitioner's) wishes "are to be considered, but the best interests of Brittany in maintaining a relationship with the grandparents outweighs that consideration. Brian Collier has stated on the record that he will resist visitation, which will likely create confusion for Brittany, but that is

outweighed by the relationship which she has with her grandparents." (App., Infra pp. 40a-41a). The trial court's decision discussed the applicability of *Troxel v. Granville* (2000), 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49 to this case and found that "in cases such as this one, the court should only order visitation with a grandparent over the opposition of the parent when the court finds overwhelming evidence to support forcing visitation for the benefit of the child. It is presumed that the best interests of the child is the parent's wishes, absent a finding that the parent is unfit to make an informed decision." (App., Infra p. 42a). Based upon the *Troxel* rational, the trial court denied the grandparent visitation.

Petitioner felt so strongly about the issue he was willing to go to jail (and in fact did) rather than permitting the visitation during his appeal process (App., Infra p. 45a).

(B) The State Court of Appeals

In the next appeal, the appeal to the Ninth District Court of Appeals, the Court in it's opinion states "Mr. Collier attested that the trial court violated his constitutional rights to raise his child as he sees fit when, despite his objection, it granted the Harrolds' visitation with Brittany" (App., Infra p. 21a). The Court of Appeals distinguished *Troxel* from this case:

> 1. Unlike the Washington statute in Troxel, the Ohio statutes governing grandparent visitation rights do not allow any person, at any time, to seek visitation, and in that sense are not "sweepingly overbroad" (App., Infra p. 26a).

2. The Ohio statute, R.C. § 3109.051(D) (App., Infra pp. 59a-62a) provides many factors for a court to consider and does require consideration of the parents preference with respect to non-parental visitation (App., Infra p. 26a).

The Court of Appeals found the language in *Troxel*, 530 U.S. at 70, to be solely dicta that the Court must accord at least some special weight to the parent's own determination (App., Infra p. 27a). The Court stated "In light of the narrow holding of the Supreme Court in *Troxel*, we must conclude that the trial court erred as a matter of law in its interpretation and application of the decision in *Troxel*." (App., Infra p. 29a).

(C) The Ohio Supreme Court

The Supreme Court of Ohio held that Ohio courts are obligated to afford some special weight to the wishes of parents of minor children when considering petitions for non-parental visitation made pursuant to R.C. § 3109.11 or § 3109.12.

The Court then determined that the Ohio statues are more narrowly drawn and are capable of a more narrow construction than the Washington statute in *Troxel*. Secondly, the Court found that the visitation statutes, R.C. § 3109.11 and § 3109.12, expressly identify the parent's wishes and concerns regarding visitation as a factor the Court must consider in making its determination, by incorporating R.C. § 3109.051(D).

Regarding the presumption that fit parents act in the best interest of their children, the Supreme Court went on to say that nothing in *Troxel* indicates that the presumption is

irrefutable. The Ohio Supreme Court determined that "moreover nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest. The state has a compelling interest in protecting a child's best interests. *In re: TR* (1990), 52 O.S.3d 6, 18, 556 N.E.2d 439, and Ohio's non-parental visitation statutes are narrowly tailored to serve that compelling interest. They are not, therefore, unconstitutional under *Troxel*." (App., Infra pp. 15a-16a).

Finally, the Ohio Supreme Court determined that the trial court misinterpreted *Troxel* as requiring courts to find "overwhelmingly clear circumstances" to support forcing visitation for the benefit of the child over the opposition of the parent. The State Supreme Court indicated that *Troxel* did not articulate such a standard, rather, the plurality of the Court expressly declined to define "the precise scope of the parental due process right in the visitation context". Accordingly, the Ohio Supreme Court found that R.C. § 3109.11, R.C. § 3109.12, and § 3109.0519(D) are constitutional as applied in this case, and constitutional on their face.

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The Supreme Court of Ohio has decided an important federal questions in a way that conflicts with the relevant decisions of this Court.

A. Ohio Revised Code § 3109.11 and § 3109.12 are unconstitutional, both facially and in their application in that they infringe on a parent's fundamental right to make decisions concerning the care, custody and control of one's child, which right is protected by the due process clause of

the Fourteenth Amendment of the United States Constitution.

(1) The Ohio Statutory Scheme.

R.C. § 3109.11 provides that when the father or mother of an unmarried minor child is deceased, the Court may grant the parents and other relatives of the deceased parent visitation if the Court determines that the granting of the visitation is in the best interest of the child. In making this best interest of the child analysis, the statute indicates that the Court shall consider all relevant factors set forth in R.C. § 3109.051(D). R.C. § 3109.051(D) provides many factors that a Court must consider in granting or denying visitation rights to a grandparent, relative, or other person. R.C. § 3109.05(D)(15) requires a Court to consider "in relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court."

R.C. § 3109.12 provides that a court may grant visitation to the parents of an unmarried woman and any relative of such woman if it determines that the granting of the visitation is in the best interest of the child. In determining this best interest the Court shall consider all relevant factors including but not limited to those factors set forth in R.C. § 3109.15(D).

(2) The Ohio Supreme Court Decision

The Ohio Supreme Court found that the questioned Ohio statutes are capable of a more narrow construction than the Washington statute in *Troxel*. The Washington statute allowed "any person" to petition the Court for visitation at "any time". Ohio limits the parties who can petition and limits the application to cases where there is a predicate event,

i.e. the death of a parent. Furthermore the Ohio Supreme Court reasons that the Ohio and Washington statutes are dissimilar in that the Ohio statute expressly identifies the parent's wishes and concerns as a mandatory factor whereas the Washington statute contains no such reference. In the wake of *Troxel*, the Ohio Supreme Court holds that a trial court must give special weight to that factor and reasons that a parent's due process rights are thus protected.

The Court gives lip service to this Court's statements in *Troxel* regarding the presumption that fit parents act in the best interest of their children, noting that nothing in Troxel indicates that this presumption is irrefutable. The Court stated "By stating in *Troxel* that a trial court must accord at least some special weight to the parent's wishes, the U.S. Supreme Court plurality did not declare that factor to be the sole determinant of the child's best interest. Moreover, nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest. The state has a compelling interest in protecting a child's best interests. *In re: TR* (1990), 52 O.S.3d 6, 18, 556 N.E.2d 439, and Ohio's non-parental visitation statutes are narrowly tailored to serve that compelling interest. They are not, therefore, unconstitutional under *Troxel*."

(3) The *Troxel* Decision and its application to this case.

In *Troxel*, this Court reaffirmed a parent's fundamental constitutional right to make decisions concerning the care, custody and control of one's children:

> We have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children . . . In light of this extensive precedent, it cannot now be doubted that the Due

> Process Clause of the 14th Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.

530 U.S. at 65, 120 S.Ct. at 2060; citations omitted.

Even Justice Kennedy in his dissent noted the Court's:

> General, perhaps unanimous agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture and educate the child. The parental rights stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. 530 U.S. at 95; 120 S.Ct. at 2076.

This Court also made it clear that this fundamental right is implicated in grandparent visitation cases. 530 U.S. at 65, 67, 68, 80, 120 S.Ct. at 2059, 2060, 2061, 2068.

While it may be argued that the Ohio statutes do not suffer from the extraordinary breath of the former Washington statute, the *Troxel* decision was not based solely on the statute's over breath.

First of all, a majority of the Justices in Troxel based their ruling on how the Washington state statute was applied – not on its facial breath. The plurality opinion of four Justices focused on what presumptions the Washington trial court did and did not use in reaching its decision. In his concurring opinion, Justice Thomas focused on the compelling state interest and Justice Stevens in his dissent reaffirmed the

constitutional presumption that fit parent's decisions are in the child's best interest.

A number of states has already applied Troxel beyond facial constitutionality: Iowa in *Lamberts v. Lillig* (2002), 670 N.W.2d 129; Michigan in *Derose v. Derose* (2003), 666 N.W.2d 636; Illinois in *Lulay v. Lulay* (2000), 739 N.E.2d 521; New Jersey in *Wilde v. Wilde* (2001), 775 A 2d 535; Oklahoma in *Veal v. Lee*, 14 P.3d 547 (Okl 2000), *Ingram v. Knippers*, 77 P.3d 17 (2003); Indiana in *Crafton v. Gibson*, 752 N.E.2d 78 (2001); Kansas in *Skov v. Wicker*, 32 P.3d 1122 (Kan. App. 2001), *State Dept. of Social Rehab Services v. Paillet*, 270 Kan 646 (2001); West Virginia in *State ex rel Brandon L. v. Moats*, 551 S.Ed.2d 674 (W Va. 2001); Arkansas in *Linder v. Linder*, 348 Ark 322 (2002). All of these states considered *Troxel* in its application to their state statutes. Indeed, this very Court made it clear that *Troxel's* holdings are not limited to statutes with especially loose standing requirements. *Dodge v. Graville*, 533 U.S. 945 (2001).

Moreover, Petitioner does not concede the narrowness of Ohio's statutes. The Washington statute pertained to "any person". The Ohio statute pertains to grandparents "or any other relatives" in R.C. § 3109.11 and "any relative of the father" in R.C. § 3109.12. Is there any real difference in the breath of the two statutes?

It is Petitioner's contention that any statute allowing any non-parent visitation rights in contravention of a fit parent's wishes is repugnant to that parent's constitutional rights.

Under Ohio law, when a grandparent seeks visitation under R.C. § 3109.11 or § 3109.12, the Court must make a determination of whether or not the visitation is in the best

interest of the child. This "best interest" determination is fundamentally flawed. *Troxel* states:

> "the due process clause does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better decision could be made."

530 U.S. at 72-73, 12 S.Ct. at 2064.

In *Troxel*, a majority of this Court held that state courts in visitation cases must apply "a presumption that fit parents act in the best interest of their children" and trial courts must "give special weight to a parent's determination of his children's best interests." 530 U.S. at 69, 120 S.Ct. at 2061, 2062. Justice Thomas, although not using the same phraseology, would apply strict scrutiny, to any attempt to interfere with the parent's decision. 530 U.S. at 80, 120 S.Ct. at 2068. *Troxel* was one of a series of cases reaffirming these principles, though the first to apply them in the non-parent visitation context. See *Parkam, et al. v. JR, et al.*, 442 U.S. 584 (1979) at 602-603; *Hodgson v. Minn*, 497 U.S. 417 (1990). Here Petitioner's decision to cut off and restrict contact between his child and the child's grandparents was the last act in a long drama. In *Parkam's* words "neither state officials nor federal courts are equipped to review such parental decisions." 442 U.S. at 604.

The Ohio Supreme Court opines that a parent's rights are protected under Ohio law because nothing in R.C. § 3109.051(D) prevents the trial court from giving special weight to the parent's wishes and concerns. The court states that this requirement is not minimized simply because Ohio has chosen to enumerate 15 other factors that must be considered by the trial court. According to the Ohio Supreme

Court the statutes "not only allow the trial court to afford parental decisions the requisite special weight, but they also allow the court to take into consideration the best interests of the child and balance that interest against a parent's desires." That is precisely what Petitioner claims makes Ohio's statute unconstitutional. It is clear that the Ohio statutory language gives no special weight to the parent's decision nor does the statute require any elevated level of scrutiny.

As stated, the Ohio Supreme Court gives lip service to this special weight requirement. In addition, *Troxel* mandates a presumption that a fit parent's decision on visitation is in the child's best interest. This presumption is at the heart of the *Troxel* decision, 530 U.S. at 69, 120 S.Ct. at 2061, 2062. All of the Justices, even Justice Kennedy and Justice Stevens, who both dissented, acknowledge the presumption.

In the decisions below, we find absolutely no deference given to Petitioner's wishes; no presumption was considered or applied.

In the original Magistrate's Decision, which granted visitation to Gary and Carol Harrold, the findings are devoid of any mention of "special weight" given to Petitioner's decision. Further, there is no mention of a presumption that fit parents make decisions in the best interest of the child. Obviously, the decision was based solely on a "best interest" standard, i.e. the Magistrate thought it would be "better" for the child to receive visits from the Harrolds. As stated in this petition, this analysis lies at the basis of Petitioner's claim that the Ohio statutes are unconstitutional. How can the State Supreme Court say that the Magistrate gave special weight to Petitioner's decision and applied a presumption to that decision when there is no mention of either one in that Magistrate's Decision?

On the appeal to the trial Judge, after reciting the best interest considerations in R.C. § 3109.051(D), the Court applied those considerations to the facts of this case. In discussing Petitioner's choice, the trial court states:

> (8) The father, Brian Collier, has made it perfectly clear that he does not wish visitation between Brittany and the grandparents. His wishes are to be considered, but the best interests of Brittany in maintaining a relationship with her grandparents outweigh that consideration . Brian Collier has stated on the record that he will resist visitation, which will likely create confusion for Brittany, but that is outweighed by the relationship which she has with her grandparents (App., Infra pp. 40a-41a).

The trial court then went on to state the status of the law in Ohio in visitation cases prior to *Troxel*. Ohio courts generally upheld visitation on a best interest standard (App., Infra p. 41a).

The trial court next considered the question of whether or not the standard had changed since *Troxel*. After *Troxel*, the trial court stated "the consensus appears to be that a grandparent's right to visitation, over the objection of the parent, must be subject to strict scrutiny by the trial court so as to give deference to the wishes of a natural parent and minimize interference by third-parties on how a parent can raise a child". (App., Infra p. 41a). The Court went on:

> "In cases such as this one, the court should only order visitation with a grandparent over the opposition of the parent when the court finds overwhelming evidence to support forcing visitation for the benefit of the child.

> It is presumed that the best interest of the child is the parent's wishes, absent a finding that the parent is unfit to make an informed decision (App., Infra p. 42a).

The trial court made it clear that under the "best interest" analysis, visitation should be granted, however, a different result applies under *Troxel*. "But, we now have the decisions and guidance of *Troxel* and *Oliver* to consider. As much as this court would like to encourage visitation between Brittany and her grandparents, there is insufficient proof in the record to find there are overwhelmingly clear circumstances to overrule the wishes of the parent, Brian Collier." (App., Infra pp. 43a-44a).

The difference in the treatment of these visitation cases before and after *Troxel* could not be more clear than as it is set forth in the trial judge's order. Prior to *Troxel*, the analysis was strictly on a "best interest" standard. Generally, under that standard visitation was granted. After *Troxel*, once the special weight and the presumption are applied, the result would change. The trial court in this case is best suited to make these determinations. Everyday, such a court, makes "best interest" decisions in its busy schedule. This experienced trial judge saw the distinction and made a decision accordingly.

The Ohio Supreme Court readily adopted the trial court's "best interest" analysis but twists the trial court's application of *Troxel*. Rather than acknowledging the clear distinction the trial court makes between pre and post *Troxel* decision making, the Ohio Supreme Court states:

> 1. The trial court placed the burden of proving visitation would be in the best interest of Brittany

on Appellees (the Harrolds) thus honoring the presumption that fit parents act in their child's best interest.

2. The trial court expressly weighed Appellant's opposition to visitation between Brittany and Appellees as a factor in its decision, thus protecting Appellant's (Petitioner's) due process rights.

3. Unfortunately, the trial court misinterpreted *Troxel* as requiring courts to find "overwhelmingly clear circumstances" to support forcing visitation because *Troxel* declined to define the scope of parental due process in the visitation context.

As previously stated, the Ohio Supreme Court distorts the trial court's reasoning. The trial court clearly indicated that under the "best interest" analysis, visitation ought to be granted. However, the trial court was equally clear that in applying the *Troxel* "special weight" and "fit parent presumption" visitation cannot be granted. Placing the burden of proving the "best interest" analysis on the party moving for visitation does not honor the traditional presumption nor does the mere fact that the parent's wishes are a factor in that consideration protect due process rights. The dichotomy between pre and post *Troxel* considerations cannot be more apparent than in this experienced trial judge's decision.

The Ohio Supreme Court opined that the trial court's requirement that court's find "overwhelmingly clear circumstances" misinterpreted *Troxel* in that *Troxel* declined to define the precise scope of the parental due process rights. Obviously, it is hard to imagine how the trial court could

misinterpret something the U.S. Supreme Court chose not to define. However, the trial court did its best to offer some explanation. The trial court cited an Ohio case, *Oliver v. Feldner*, 2002 149 Ohio App.3d 114, which in turn quoted this Court in *Rodriques v. Hawaii* (1984), 469 U.S. 1078, 1080, 105 S.Ct. 580 and defined special weight as "a very strong term signifying deference". The trial court went on to state "essentially a parent's wishes will be overcome only by a compelling state interest, supported by overwhelmingly clear circumstance." It was based upon that definition that the Ohio Supreme Court essentially overturned this very experienced trial judge's decision. Is this standard, set by the trial judge, really any different than this Court's traditional standard in strict scrutiny application, a standard Justice Thomas explicitly addressed in his concurring opinion in *Troxel*? To overcome strict scrutiny the party seeking to interfere with the protected right must prove that it has a compelling state interest in its infringement, and must then prove not only that the challenged infringement is an effective means of serving that compelling state interest but that no less restriction means is available. *Bakke*, supra, 438 U.S. at 357. By his use of the term "overwhelmingly clear circumstances", was the trial judge setting a standard much different than a compelling state interest served by the less restrictive means, especially when that same trial judge offers a definition of "a very strong term signifying deference" taken from this very court? The Ohio Supreme Court offers no definition of its own – only that the trial court misinterpreted *Troxel*.

Dodge v. Graville, 533 U.S. 945 (2001) suggests the mere presence of a factor such as the factor in R.C. § 3109.051(D)(15) is insufficient. The Arizona statute in question required the Court "to consider all relevant factors, including . . . the motivation of the person denying visitation." This is very similar to R.C. § 3109.051(D)(15).

This Court vacated and remanded the case for consideration of *Troxel*. The inclusion of the parent's wishes as one of many factors is an insufficient protection of their fundamental right.

In *Troxel*, a clear majority of the Justices of this Court have stated, with the implicit approval of other Justices, that trial courts must presume a parent's decision to limit or deny visitation is a correct decision, in the best interest of the child:

> "So long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's child.

Troxel, 530 U.S. at 68-69, 120 S.Ct. at 2001.

In *Troxel*, a majority of the U.S. Supreme Court held that state courts considering visitation petitions must apply "a presumption that fit parents act in the best interest of their children. 530 U.S. at 69, 120 S.Ct. at 2061, 2062. Justice Thomas concurring, in effect went even further. Justice Thomas applied a "strict scrutiny" standard. 530 U.S. at 80, 120 S.Ct. at 2062. Justice Sauter, in his concurring opinion, referenced the plurality opinion. 530 U.S. at 78, 120 S.Ct. at 2066. Justice Stevens in his dissent stated:

> "Our cases . . . have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that natural bonds of affection lead parents to act in the best interest of their children . . . Because our substantive due process law includes a strong presumption that a parent will act in the best

> interest of his child, it would be necessary, were the state appellate courts . . . to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the 'best interest of the child' incorporate that presumption.

530 U.S. at 87, 89-90, 120 S.Ct. at 2071, 2073. Thus the *Troxel* decision clearly supports the requirement that trial courts presume a parent's decision to limit or deny visitation is the correct decision, best serving the interest of the child. The Ohio statues fail in that regard.

II. The Supreme Court of Ohio has decided an important question of federal law that has not been but should be settled by this Court.

As this Court is well aware, the Troxel decision expressly declined to define "the precise scope of the parental due process right in the visitation context." 530 U.S. at 73, 120 S.Ct. 2054, 147 L.Ed.2d 49. The Ohio Supreme Court decided that the trial court misinterpreted *Troxel* as requiring Courts to find "overwhelmingly clear circumstances" to support forcing visitation for the benefit of the child over the opposition of the parent. The Ohio Supreme Court did not define the scope but only held that the standard of "overwhelmingly clear circumstances" was not correct.

In *Troxel*, Justice Thomas opined that the courts must apply strict scrutiny when a grandparent attempts to rebut the presumption favoring the parent's decision. Strict scrutiny is the usual standard applied to infringements of fundamental rights, including the right of family privacy and autonomy. *Washington v. Glucksberg*, 521 U.S. 702, 701 (1997). To overcome strict scrutiny, the party seeking to interfere with the protected right must prove that it has a compelling state

interest in its infringement. *Regents v. Bakke*, 438 U.S. 265, 357 (1978). That party must then prove not only that the challenged infringement is an effective means of serving that compelling statute interest, but that no less restrictive means is available. *Bakke*, supra 438 U.S. at 357.

Ohio, therefore, has defined the scope of the parental due process right as not being the standard of "overwhelmingly clear circumstances" and offers no further definition. It would appear that this Court may favor a strict scrutiny standard.

Together with the above questions regarding the scope of parental due process, states lack direction in defining "special weight" in the visitation context. Previous Supreme Court precedent indicates that "special weight" is a strong term signifying very considerable deference. See e.g. *Comstock v. Group of Institutional Investors* (1948), 335 U.S. 211, 230 (findings of a bankruptcy judge are given special weight); *Tibbs v. Florida*, 457 U.S. 31 (1982) (double jeopardy clause given special weight to judgments of acquittal). Ohio has defined special weight as "a very strong term signifying extreme deference". *Oliver v. Feldner* (2002), 149 O. App.3d 114 at 125. Petitioner would argue that the term "special weight", as defined by the precedent of this court and Ohio cases, means that the deference provided to the fit parent's wishes will only be overcome by a compelling governmental interest and overwhelmingly clear circumstances supporting that governmental interest. States need direction in this regard.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

No. 04-1647

[Filed October 10, 2005]

The Estate of Renee Harrold	)
	)
v.	)
	)
Brian S. Collier	)
	)
v.	)
	)
Gary Harrold and Carol Harrold	)
	)

APPEAL from and CERTIFIED by
the Court of Appeals for Wayne County
No. 03CA0064

This cause, here on the certification of a conflict from the Court of Appeals for Wayne County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that costs are assessed pursuant to S.Ct.Prac.R. XI(5), and that a mandate be sent to the Court

of Appeals for Wayne County to carry this judgment into execution; and that a copy of this entry be certified by the Clerk of the Court of Appeals for Wayne County for entry.

/s/_____

THOMAS J. MOYER
Chief Justice

SYLLABUS OF THE COURT

1. Ohio courts are obligated to afford some special weight to the wishes of parents of minor children when considering petitions for nonparental visitation made pursuant to R.C. 3109.11 or 3109.12. (*Troxel v. Granville* (2000), 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49, followed.)

2. The state has a compelling interest in protecting a child's best interest and Ohio's nonparental visitation statutes are narrowly tailored to serve that compelling interest. (R.C. 3109.11 and 3109.12, construed and applied.)

JUDGES: ALICE ROBIE RESNICK, J. MOYER, C.J., PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.

OPINION

ALICE ROBIE RESNICK, J.

Renee Harrold and appellant, Brian S. Collier, shared a relationship that produced a daughter, Brittany Renee Collier (born July 28, 1997). The two never married and, after Brittany's birth, Renee Harrold was designated as Brittany's residential parent. Appellant received supervised visitation with Brittany twice a week.

From her birth, Brittany resided with her mother at the home of her maternal grandparents, appellees Gary and Carol Harrold. Renee Harrold was suffering from cancer, and appellees took care of Renee until her death on October 10, 1999. Following Renee's death, appellees were granted temporary legal custody of Brittany.

Appellant subsequently filed for legal custody of Brittany, and the Wayne County Juvenile Court designated him as Brittany's residential parent. On July 31, 2002, appellant removed Brittany from appellees' home, where she had lived for the previous five years, and refused to permit any further visitation between Brittany and the appellees.

Appellees filed a motion for grandparent visitation with Brittany. After hearing evidence on the motion, the juvenile court magistrate issued a decision granting the appellees' motion for visitation. The magistrate expressly noted appellant's opposition to visitation between Brittany and appellees, but found that appellant's actions had not been in the best interest of Brittany. The magistrate reasoned that Brittany had been in the custody of appellees for three years following her mother's death and found that the appellees provided an important link to Brittany's deceased mother. Therefore, the magistrate concluded that grandparent visitation with the appellees was in Brittany's best interest. After conducting an independent review of the magistrate's findings and decision, the juvenile court judge issued an order granting appellees visitation with Brittany.

Appellant objected to the juvenile court's decision granting the appellees' motion for visitation. In ruling on the objections, the juvenile court found that Brittany's interest in maintaining her relationship with the appellees outweighed appellant's wishes for no visitation. However, the juvenile court held that the United States Supreme Court's decision in *Troxel v. Granville* (2000), 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49, requires courts to find "overwhelmingly clear circumstances" that support forcing visitation for the benefit of the child over the opposition of the parent. Therefore, the juvenile court ruled that, although the statutory factors seemed to support visitation with appellees over the

objection of appellant, there was insufficient proof in the record to find overwhelmingly clear circumstances for overruling the wishes of appellant. Consequently, the juvenile court sustained appellant's objections and dismissed the appellees' motion for visitation.

On appeal, the Ninth District Court of Appeals held that the juvenile court erred in its interpretation and application of *Troxel* to the case. *Estate of Harrold v. Collier,* Wayne App. No. 03CA0064, 2004 Ohio 4331. The appellate court found that the United States Supreme Court reached a narrow holding in *Troxel* -- namely, that the "sweeping overbreadth" of the Washington state nonparental visitation statute rendered the statute unconstitutional when applied. *Id.* at ¶14 and ¶18. Because the Ninth District Court of Appeals found that the Washington state statute in *Troxel* was distinguishable from Ohio's nonparental visitation statutes, the appellate court ruled that *Troxel* did not invalidate Ohio's nonparental visitation statutes. Accordingly, the court of appeals reversed the juvenile court's dismissal of the appellees' motion for visitation and remanded the cause to the juvenile court for an assessment of the motion for visitation under the applicable Ohio statutes.

Upon motion by the appellant, the court of appeals found its judgment to be in conflict with the judgment of the Seventh District Court of Appeals in *Oliver v. Feldner,* 149 Ohio App. 3d 114, 2002 Ohio 3209, 776 N.E.2d 499, on the following issue: "Whether Ohio Courts are obligated to afford 'special weight' to the wishes of the parents of minor children concerning non-parental visitation as outlined in *Troxel v. Granville* (2000), 530 U.S. 57 [120 S. Ct. 2054, 147 L. Ed. 2d 49]." The cause is now before this court upon our determination that a conflict exists, as well as our acceptance of a discretionary appeal.

CERTIFIED CONFLICT ISSUE

In *Troxel,* the United States Supreme Court reviewed an action arising out of a Washington statute that permitted "any person" to petition for visitation rights "at any time" and authorized a court to grant such rights whenever the visitation may serve a child's best interest. *Id.*, 530 U.S. at 60, 120 S. Ct. 2054, 147 L. Ed. 2d 49, quoting Wash.Rev.Code 26.10.160(3). In the case before the U.S. Supreme Court, the Troxels petitioned for visitation with their two granddaughters following the death of their son, the granddaughters' father. The girls' mother objected. The trial court granted visitation to the Troxels, finding that visitation was in the girls' best interests. The Washington Supreme Court held that the Troxels could not obtain visitation with their granddaughters because the Washington state statute permitting such visitation unconstitutionally infringed on the fundamental right of parents to rear their children. *Id.* at 67, 120 S. Ct. 2054, 147 L. Ed. 2d 49.

Upon review, the United States Supreme Court found that the state's visitation statute unconstitutionally infringed on the mother's fundamental right to make decisions concerning the care, custody, and control of her daughters. In so holding, the court recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49.

The court found that the Washington trial court placed on the mother, the custodial parent, the burden of disproving that visitation would be in the best interest of her daughters. In so doing, the court ruled, the trial court disregarded the traditional presumption that a fit parent acts in the best

interest of his or her child. *Id.* at 69, 120 S. Ct. 2054, 147 L. Ed. 2d 49.

A plurality of the *Troxel* court went beyond invalidating the statute to discuss the scope of the parental right and its required protections. The plurality stated that the problem was not that the trial court intervened into the private realm of the family, but that when it did, "it gave no special weight at all" to the mother's determination of her daughters' best interests. *Id.* The plurality stated that, if a fit parent's decision regarding nonparental visitation becomes subject to judicial review, "the court must accord *at least some special weight* to the parent's own determination." (Emphasis added.) *Id.* at 70, 120 S. Ct. 2054, 147 L. Ed. 2d 49. However, the plurality explicitly declined to "define * * * the precise scope of the parental due process right in the visitation context." Id. at 73, 120 S. Ct. 2054, 147 L. Ed. 2d 49.

Therefore, adopting the plurality view in *Troxel,* we answer the certified conflict issue in the affirmative. Ohio courts are obligated to afford some special weight to the wishes of parents of minor children when considering petitions for nonparental visitation made pursuant to R.C. 3109.11 or 3109.12.

OHIO'S NONPARENTAL VISITATION STATUTES

In his discretionary appeal, appellant argues that Ohio's nonparental visitation statutes, R.C. 3109.11 and 3109.12, unconstitutionally infringe on a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child. We disagree.

R.C. 3109.11 states:

"If either the father or mother of an unmarried minor child is deceased, the court of common pleas of the county in which the minor child resides may grant the parents and other relatives of the deceased father or mother reasonable companionship or visitation rights with respect to the minor child during the child's minority if the parent or other relative files a complaint requesting reasonable companionship or visitation rights and if the court determines that the granting of the companionship or visitation rights is in the best interest of the minor child. In determining whether to grant any person reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in division (D) of section 3109.051 of the Revised Code."

R.C. 3109.12 provides:

"(A) If a child is born to an unmarried woman, the parents of the woman and any relative of the woman may file a complaint requesting the court of common pleas of the county in which the child resides to grant them reasonable companionship or visitation rights with the child. If a child is born to an unmarried woman and if the father of the child has acknowledged the child and that acknowledgement has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code or has been determined in an action under Chapter 3111. of the Revised Code to be the father of the child, the father may file a complaint requesting that the court of appropriate jurisdiction of

the county in which the child resides grant him reasonable parenting time rights with the child and the parents of the father and any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights with the child.

"(B) The court may grant the parenting time rights or companionship or visitation rights requested under division (A) of this section, if it determines that the granting of the parenting time rights or companionship or visitation rights is in the best interest of the child. In determining whether to grant reasonable parenting time rights or reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in division (D) of section 3109.051 of the Revised Code."

The factors in R.C. 3109.051 (D) are:

"(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;

"(2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;

"(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

"(4) The age of the child;

"(5) The child's adjustment to home, school, and community;

"(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

"(7) The health and safety of the child;

"(8) The amount of time that will be available for the child to spend with siblings;

"(9) The mental and physical health of all parties;

"(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

"(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

"(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has acted in a manner

resulting in a child being an abused child or neglected child;

"(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

"(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

"(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

"(16) Any other factor in the best interest of the child."

We begin our analysis with the principle that statutes carry a strong presumption of constitutionality. *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 560, 1996 Ohio 264, 664 N.E.2d 926; *Sorrell v. Thevenir* (1994), 69 Ohio St. 3d 415, 418-419, 1994 Ohio 38, 633 N.E.2d 504. The party challenging the statutes bears the burden of proving that the legislation is unconstitutional beyond a reasonable doubt. *Thompkins,* 75 Ohio St. 3d at 560, 664 N.E.2d 926; *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 38-39, 616 N.E.2d 163.

A party may challenge a statute as unconstitutional on its face or as applied to a particular set of facts. *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 28 Ohio Op. 295, 55 N.E.2d 629, paragraph four of the syllabus. A facial

challenge to a statute is the most difficult to bring successfully because the challenger must establish that there exists no set of circumstances under which the statute would be valid. *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697. The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid. *Id.*

Further, where statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making such a challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts. *Belden,* 143 Ohio St. 329, 28 Ohio Op. 295, 55 N.E.2d 629, at paragraph six of the syllabus.

If the challenged legislation impinges upon a fundamental constitutional right, courts must review the statutes under the strict-scrutiny standard. *Sorrell,* 69 Ohio St. 3d at 423, 633 N.E.2d 504. Under the strict-scrutiny standard, a statute that infringes on a fundamental right is unconstitutional unless the statute is narrowly tailored to promote a compelling governmental interest. *Id.*; *see, also, Chavez v. Martinez* (2003), 538 U.S. 760, 775, 123 S. Ct. 1994, 155 L. Ed. 2d 984.

The United States Supreme Court stated in *Troxel* that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.*, 530 U.S. at 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49. Likewise, this court has recognized that parents have a fundamental liberty interest in the care,

custody, and management of their children. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 372, 1998 Ohio 389, 696 N.E.2d 201. Therefore, we must examine Ohio's nonparental visitation statutes under the strict-scrutiny standard.

Appellant claims that Ohio's nonparental visitation statutes are sufficiently broad to be analogous to the Washington state visitation statute at issue in *Troxel.* However, contrary to appellant's assertion, the Ohio statutes are more narrowly drawn and capable of a more narrow construction than the Washington statute in *Troxel.* Unlike the Washington statute that allowed "any person" to petition the court for visitation rights at "any time," the Ohio nonparental visitation statutes limit the parties who can petition the court for visitation and limit the application of the statutes to cases where there is a specified predicate event or condition. R.C. 3109.11 applies only in cases where the mother or father of the child is deceased and limits the persons who can petition for nonparental visitation to the parents and relatives of the deceased mother or father. Likewise, R.C. 3109.12 applies only when a child is born to an unmarried woman and limits the persons who can petition for nonparental visitation to the parents and relatives of the unmarried mother and to the father and his parents or relatives, if the father has legally acknowledged paternity or a court has declared him to be the father.

Further, unlike the Washington statute at issue in *Troxel,* which contained no reference to the parents' wishes as a factor to be weighed, R.C. 3109.11 and 3109.12 expressly identify the parents' wishes and concerns regarding visitation as a factor the court must consider in making its determination, by incorporating R.C. 3109.051(D). Although the trial court can consider any factor it considers relevant,

consideration of the parents' wishes and concerns is mandatory. Moreover, in light of *Troxel* and our holding on the certified conflict issue above, a trial court must give special weight to that factor in making its visitation determination, thus protecting a parent's due process rights.

Nothing in R.C. 3109.11, 3109.12, or 3109.051(D) prevents the trial court from giving such special weight to the parent's wishes and concerns regarding visitation. In fact, special weight is required by R.C. 3109.051(D)(15) since the statute explicitly identifies the parents' wishes regarding the requested visitation or companionship as a factor that must be considered when making its "best interest of the child" evaluation. This requirement is not minimized simply because Ohio has chosen to enumerate 15 other factors that must be considered by the trial court in determining a child's best interest in the visitation context. Ohio's nonparental visitation statutes not only allow the trial court to afford parental decisions the requisite special weight, but they also allow the court to take into to consideration the best interest of the child and balance that interest against the parent's desires.

Further, while *Troxel* states that there is a presumption that fit parents act in the best interest of their children, nothing in *Troxel* indicates that this presumption is irrefutable. The trial court's analysis of the best interests of a child need not end once a parent has articulated his or her wishes. By stating in *Troxel* that a trial court must accord at least some special weight to the parent's wishes, the U.S. Supreme Court plurality did not declare that factor to be the sole determinant of the child's best interest. Moreover, nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest. The state has a compelling interest in protecting a child's best interest, *In re T.R.* (1990), 52 Ohio St. 3d 6, 18, 556 N.E.2d 439, and Ohio's nonparental

visitation statutes are narrowly tailored to serve that compelling interest. They are not, therefore, unconstitutional under *Troxel*.

In this case, the trial court properly placed the burden of proving that visitation would be in the best interest of Brittany on the appellees, thereby honoring the traditional presumption that a fit parent acts in the best interest of his or her child. Further, the trial court expressly weighed appellant's opposition to visitation between Brittany and appellees as a factor in its decision, thus protecting the appellant's due process rights. The court ultimately decided that Brittany's best interests in maintaining her relationship with appellees outweighed appellant's desire for no visitation. While the trial court did not use the words "special weight," it is clear that the court gave due deference to appellant's wishes and concerns regarding visitation before determining that it was in Brittany's best interest to grant the appellees' motion for grandparent visitation.

Unfortunately, the trial court misinterpreted *Troxel* as requiring courts to find "overwhelmingly clear circumstances" to support forcing visitation for the benefit of the child over the opposition of the parent. *Troxel* did not articulate such a standard. Rather, the plurality of the court expressly declined to define "the precise scope of the parental due process right in the visitation context." *Id.*, 530 U.S. at 73, 120 S. Ct. 2054, 147 L. Ed. 2d 49.

Accordingly, we find that Ohio's nonparental visitation statutes -- R.C. 3109.11, 3109.12, and 3109.051(D) -- are constitutional as applied to the parties in this case. Further, since there exists a set of circumstances under which the statutes are valid, R.C. 3109.11, 3109.12, and 3109.051(D) are constitutional on their face. *See Salerno*, 481 U.S. at 745,

107 S. Ct. 2095, 95 L. Ed. 2d 697. We, therefore, affirm the judgment of the court of appeals.

There is no reason to remand the cause to the trial court for yet another assessment of appellees' motion for grandparent visitation under the Ohio statutes. The facts of this case clearly warrant granting grandparent visitation to appellees, especially considering that they raised Brittany for the first five years of her life. The trial court evaluated the statutory factors and protected appellant's due process rights by giving special weight to appellant's objections to the visitation before determining that granting grandparent visitation was warranted under the Revised Code. Therefore, we remand the matter to the trial court solely for the purpose of establishing a schedule to facilitate visitation between Brittany and the appellees under the applicable Ohio statutes.

Judgment affirmed.

APPENDIX B

THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

No. 03CA0064

[Filed August 18, 2004]

The Estate of Renee Harrold, Appellee;	)
	)
v.	)
	)
Brian S. Collier, Appellee/Cross-Appellant;	)
	)
v.	)
	)
Gary Harrold and Carol Harrold, Appellants/Cross-Appelle	)

Appeal from Judgment Entered in the
Court of Common Pleas
County of Wayne, Ohio
Case No. 97-1440-PAR

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

Appellants/cross-appellees, Gary Harrold and Carol Harrold (the "Harrolds"), appeal, and appellee/cross-appellant, Brian S. Collier, cross-appeals, from the decision of the Wayne County Court of Common Pleas, Juvenile Division. We reverse and remand.

I.

This appeal concerns a challenge to the Harrolds' visitation rights with their granddaughter, Brittany Collier ("Brittany"). Custody of Brittany and grandparental visitation rights were the subject of a prior appeal to this Court, pursuant to which we issued a decision and journal entry on July 31, 2002. *Harrold v. Collier*, 9th Dist. No. 02CA0005, 2002 Ohio 3864. In that decision, this Court recounted the underlying substantive facts, as follows:

> "Renee Harrold [("Renee")] and [Mr.] Collier were in a dating relationship, but the couple never married. They are the biological parents of one child, Brittany Collier, who was born to them on July 28, 1997. During her pregnancy, Renee was diagnosed with cancer and she chose not to undergo treatment until after Brittany's birth. Both Renee and Brittany lived with Renee's parents, Carol and Gary Harrold. On June 2, 1998, Renee and [Mr.] Collier submitted an agreement to the court concerning an allocation of parental rights between them for Brittany. The agreement designated Renee the sole residential parent

and ordered a supervised visitation schedule for [Mr. Collier] with Brittany.

"Renee died of cancer on October 10, 1999, and her parents were designated Brittany's legal custodians on an ex parte basis on October 12, 1999. On October 21, 1999, [Mr. Collier] agreed to grant the Harrolds temporary legal custody of Brittany, and she continued to live with her grandparents. [Mr. Collier] has exercised his visitation rights with Brittany throughout her life. He also filed two motions with the court between 1998 and 2000 to modify his visitation sessions. In May of 2001, [Mr. Collier] filed a motion for full custody of Brittany. On December 12, 2001, the trial court held a modification of custody hearing among [the Harrolds], and [Mr. Collier], awarding custody of Brittany to [Mr. Collier]." *Id.* at¶2-3.

When the trial court awarded custody of Brittany to Mr. Collier, it also included an order of visitation rights for the Harrolds. A visitation schedule was to be filed with the court and commence as soon as the custody transition occurred.

In a decision and journal entry dated July 31, 2002, this Court, inter alia, affirmed the trial court's award of custody of Brittany to Mr. Collier. *Harrold* at ¶15. This Court also found that the trial court was without authority to award grandparental visitation to the Harrolds because the Harrolds had not yet asserted these rights pursuant to R.C. 3109.11 and 3109.12. *Id.* at ¶24.

The Harrolds filed a motion for grandparental visitation rights and payment of medical expenses for Brittany. A hearing was held on this matter, pursuant to which a magistrate issued a decision granting the Harrolds temporary

grandparental visitation, and stating that an automatic stay of the judgment was precluded. Thereafter, the trial court entered a judgment entry granting the Harrolds visitation with Brittany.

Mr. Collier filed objections to the magistrate's decision granting grandparental visitation and denying an automatic stay of the visitation order. Mr. Collier attested that the trial court violated his constitutional rights to raise his child as he sees fit when, despite his objection, it granted the Harrolds visitation with Brittany.

Thereafter, the Harrolds filed a motion for contempt against Mr. Collier for failure to abide by the trial court's visitation order. The trial court granted this motion and found Mr. Collier in contempt.[1] Thereafter, the Harrolds filed another motion for contempt against Mr. Collier after he refused to allow the Harrolds their court-ordered visitation with Brittany. The trial court also granted this motion and again found Mr. Collier in contempt of court.

Thereafter, the trial court entered a judgment on Mr. Collier's objections to the magistrate's decision granting temporary grandparental visitation and refusing to stay the visitation order. The trial court sustained Mr. Collier's objections and denied visitation between the Harrolds and Brittany. This appeal followed.

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[1] Mr. Collier appealed to this Court from the trial court's finding of contempt. We dismissed Mr. Collier's appeal for failure to file a brief.

The Harrolds timely appealed, asserting three assignments of error for review, and Mr. Collier timely cross-appealed, asserting two cross assignments of error.

II.

A.

First Assignment of Error

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE MATERNAL GRANDPARENTS' PETITION FOR VISITATION WITH THEIR GRANDDAUGHTER."

In their first assignment of error, the Harrolds contend that the trial court erred in denying their request for visitation with Brittany. Specifically, the Harrolds aver that the trial court erred as a matter of law in its interpretation and application of United States Supreme Court's decision in *Troxel v. Granville* (2000), 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49, to the instant case. We agree with the Harrolds' averment that the trial court erred in its interpretation and application of *Troxel* to this case.

While a trial court's determinations of fact are given great deference, questions of law are reviewed by an appellate court de novo. *Wayne Mut. Ins. Co. v. Parks*, 9th Dist. No. 20945, 2002 Ohio 3990, at ¶13. As a preliminary matter, we observe that on appeal, neither party expressly and directly questions the constitutionality of Ohio's statutes governing grandparental visitation rights. However, the parties' arguments center on the Supreme Court's holding in *Troxel*. Essentially, the Harrolds argue that *Troxel* can be factually distinguished from the present case in a few respects, and that

therefore the decision in *Troxel* does not apply to deny them visitation rights in this case. Mr. Collier retorts that the *Troxel* decision is controlling in this case, because a grant of grandparental visitation rights to the Harrolds would be an absolute infringement on his fundamental right to raise Brittany. Because the parties' arguments revolve around the constitutional issues raised in *Troxel*, they must necessarily enter into our discussion.

The fundamental right of parents to the care, custody, and control of their children is well established, and was reiterated the Supreme Court in *Troxel*. *Troxel*, 530 U.S. at 66. "The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.*; *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 372, 1998 Ohio 389, 696 N.E.2d 201. Furthermore, the Supreme Court recognized the "traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69, citing *Parham v. J.R.* (1979), 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101.

The Supreme Court of Ohio has observed that grandparents had no legal right of access to their grandchildren at common law. *In re Martin*, 68 Ohio St. 3d 250, 252, 1994 Ohio 506, 626 N.E.2d 82, citing *In re Whitaker* (1988), 36 Ohio St. 3d 213, 214, 522 N.E.2d 563. Additionally, the Supreme Court has held that "grandparents have no constitutional right of association with their grandchildren." *Martin*, 68 Ohio St.3d at 252, citing *In re Schmidt* (1986), 25 Ohio St. 3d 331, 336, 25 Ohio B. 386, 496 N.E.2d 952. Furthermore, the Court has proclaimed that grandparental visitation rights can only be conferred by statute. *Martin*, 68 Ohio St. 3d at 252, citing *Whitaker*, 36

Ohio St. 3d at 217. Ohio statutes allow grandparental visitation only if it is in the grandchild's best interest. *Id.*

In *Troxel*, the Supreme Court assessed the constitutionality of the State of Washington's nonparental visitation statute. The Supreme Court described the statute in its decision, noting that the statute allowed *any* person to request the court, at any time, to grant visitation, and specified as the only requirement for granting such visitation that it serve the child's best interests. *Troxel*, 530 U.S. at 67. In a plurality opinion, the Court held that the statute, as applied in that case, was unconstitutional, because of the statute's "sweeping breadth." *Id.* at 73.

The Harrolds urge us to conclude that the decision in *Troxel* does not apply to the instant case because the Ohio statute sections governing grandparental visitation rights are distinguishable from the Washington statute in *Troxel*. The Harrolds argue that the Ohio statutes are not sweepingly overbroad, that the statutes limit the persons that can seek visitation rights, and that they give weight to the parents' wishes regarding visitation. We agree with the Harrolds' contention that the *Troxel* case is distinguishable from the instant case on these bases.

In this case, the trial court relied on R.C. 3109.11, 3109.12, and 3109.051 to assess the issue of the Harrolds' visitation rights.[2] R.C. 3109.11, which governs

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[2] It is undisputed that R.C. 3109.11 and 3109.12 are applicable to the instant case, as Renee was unmarried at the time that Brittany was born and had also passed away at the point that the Harrolds sought visitation with Brittany.

companionship or visitation rights where a parent of the child is deceased, provides the following, in pertinent part:

> "If either the father or mother of an unmarried minor child is deceased, the court of common pleas of the county in which the minor child resides may grant the parents and other relatives of the deceased father or mother reasonable companionship or visitation rights with respect to the minor child during the child's minority if the parent or other relative files a complaint requesting reasonable companionship or visitation rights and if the court determines that the granting of the companionship or visitation rights is in the best interest of the minor child. In determining whether to grant any person reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in [R.C. 3109.051(D)]."

R.C. 3109.12, parenting time, companionship or visitation rights where mother is unmarried, provides, in relevant part:

> "(A) If a child is born to an unmarried woman, the parents of the woman and any relative of the woman may file a complaint requesting the court of common pleas of the county in which the child resides to grant them reasonable companionship or visitation rights with the child. ***
>
> "(B) The court may grant the parenting time rights or companionship or visitation rights requested under division (A) of this section, if it determines that the granting of the *** companionship or visitation rights is in the best interest of the child. In determining

> whether to grant *** reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in [R.C. 3109.051(D)]."

Thus, unlike the Washington statute in *Troxel*, the Ohio statute sections governing grandparental visitation rights do not allow any person, at any time, to seek visitation, and in that sense are not "sweepingly over broad."

R.C. 3109.051(D) provides many factors that a court must consider in granting or denying visitation rights to a grandparent, relative, or other person. However, R.C. 3109.051(D)(15) does specifically require a court to consider, "in relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court[.]" Therefore, Ohio statutes do require consideration of the parents' preference with respect to nonparental visitation. Thus, we find that the Washington statute in the *Troxel* case is distinguishable from the comparable Ohio statutes, and that therefore the holding in *Troxel* does not apply to invalidate the Ohio statutes.

We observe that the plurality in *Troxel* solely held that the "sweeping overbreadth" of the Washington statute deemed it unconstitutional. However, the plurality also mentioned the weight to be afforded a fit parents' decision regarding nonparental visitation. Specifically, the Court stated that the Washington statute "failed to accord the determination of [the fit custodial parent] any material weight." *Troxel*, 530 U.S. at 72. Additionally, the Court noted that the trial court's "slender findings" in support of the visitation order, along with the "court's announced presumption in favor of

grandparent visitation" contributed to the deficiencies in that case. *Id.* The Court further stated, "if a fit parent's decision [concerning the care, custody, and control of their children] becomes subject to judicial review, the court must accord at least some *special weight* to the parent's own determination." (Emphasis added.) *Troxel*, 530 U.S. at 70. However, a careful reading of the *Troxel* plurality opinion indicates that this additional language is solely dicta. In fact, the plurality opinion specifically noted the following:

> "Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court - - whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. *** The constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." (Citations omitted.) *Troxel*, 530 U.S. at 73.

In its judgment entry denying the Harrolds' request for grandparental visitation rights, the trial court found, that, pursuant to an application of the relevant factors enumerated in R.C. 3109.051(D)(15),

> "[Mr.] Collier[] has made it perfectly clear that he does not wish visitation between Brittany and the [Harrolds]. His wishes are to be considered, but the best interests of Brittany in maintaining a relationship with [the Harrolds] outweigh that consideration. [Mr.] Collier has stated on the record that he will resist visitation, which will likely create confusion for Brittany, but that is outweighed by the relationship which she has with [the Harrolds.]"

However, the court then proceeded to discuss the *Troxel* case, as follows:

> "The Court in Troxel, by a 6-3 decision upheld the Supreme Court of Washington State which overturned grandparent visitation for the parent of a deceased parent. The decision consisted of many separate opinions, but all agreed that grandparent visitation in such cases was not unfettered. Essentially, the consensus appears to be that a grandparent's right to visitation, over the objection of the parent, must be subject to strict scrutiny by the trial court so as to give deference to the wishes of a natural parent and minimize interference by third parties on how a parent can raise a child. ***
>
> "***
>
> "Troxel did not define 'special weight', but the Oliver Court found a definition, *** saying that it is '...a very strong term signifying deference.' Essentially, a parent's wishes will be overcome only by a compelling state interest supported by overwhelmingly clear circumstances." (Internal citations omitted.)

While the trial court determined that a review of the relevant factors "seemed to support visitation with the [Harrolds] over the objection of [Mr. Collier,]" it ultimately concluded that, based upon *Troxel*, "there is insufficient proof in the record to find that there are overwhelmingly clear circumstances to overrule the wishes of the parent, [Mr.] Collier."

In light of the narrow holding of the Supreme Court in *Troxel*, we must conclude that the trial court erred as a matter of law in its interpretation and application of the decision in *Troxel*. Therefore, we sustain the Harrolds' first assignment of error, and reverse and remand this case to the trial court for assessment of the Harrolds' visitation under the applicable Ohio Revised Code statutes.

B.

Second Assignment of Error

"THE TRIAL COURT'S DECISION TO DISMISS THE HARROLDS' PETITION FOR VISITATION WITH THEIR GRANDDAUGHTER, AFTER THE COURT STATED THAT GRANDPARENT VISITATION WAS IN THE MINOR CHILD'S BEST INTEREST, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Third Assignment of Error

"THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY DISMISSING THE PETITION FOR VISITATION RIGHTS WITH THEIR GRANDDAUGHTER."

In their second and third assignments of error, the Harrolds contend that the trial court abused its discretion in denying them grandparental visitation rights, and that this decision was also against the manifest weight of the evidence.

Because of our determination above with respect to the Harrolds' first assignment of error, we need not address their second and third assignments of error, as they are now rendered moot. *See* App.R. 12(A)(1)(c).

C.

First Cross-Assignment of Error

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE AUTOMATIC STAY PROVISIONS OF JUVENILE RULE 40(E)(4)(c) WERE INAPPLICABLE[.]"

Second Cross-Assignment of Error

"THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY DETERMINING THAT THE AUTOMATIC STAY PROVISIONS OF JUVENILE RULE 40(E)(4)(c) WERE INAPPLICABLE[.]"

In his first and second cross-assignments of error, Mr. Collier avers that the trial court erred as a matter of law and abused its discretion in determining that the automatic stay provisions of Juv.R. 40(E)(4)(c) did not apply to stay the execution of the interim visitation order entered into by the trial court, pursuant to which the court found Mr. Collier in contempt of that order. Mr. Collier questions the trial court's decision not to stay the execution of the May 13, 2003 order granting the Harrolds visitation rights, thereby attempting to

collaterally challenge the trial's court order finding Mr. Collier in contempt.

Initially, a magistrate issued a decision recommending that Mr. Collier be found in contempt of the court's May 13, 2003 order. The same day, the trial court issued an order that adopted the magistrate's decision and found Mr. Collier in contempt. However, our review of the record indicates that Mr. Collier failed to file objections to the magistrate's decision finding him in contempt. Juv.R. 40(E)(3)(d) provides, "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." *In re Etter & Young* (1998), 134 Ohio App. 3d 484, 492, 731 N.E.2d 694, citing *Goldfuss v. Davidson* (1997), 79 Ohio St. 3d 116, 121, 1997 Ohio 401, 679 N.E.2d 1099; *Quist v. Phillips*, 9th Dist. No. 20761, 2002 Ohio 952.

Because Mr. Collier did not present these arguments to the trial court through properly filed objections to the magistrate's contempt decision, he cannot now assign error to the trial court's finding of contempt. *See* Juv.R. 40(E)(3)(d). Accordingly, Mr. Collier's first and second cross-assignments of error are overruled.

III.

The Harrolds' first assignment of error is sustained. The Harrolds' second and third assignments of error are not addressed. Mr. Collier's first and second cross-assignments of error are overruled. The decision of the Wayne County Court of Common Pleas, Juvenile Division, is reversed, and the cause is remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

/s/ _____
WILLIAM G. BATCHELDER
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPENDIX C

IN THE COURT OF COMMON PLEAS
JUVENILE DIVISION
WAYNE COUNTY, OHIO

Case NO.97-1440-PAR
ID NO.32043

[Filed October 7, 2003]

THE ESTATE OF RENEE HARROLD Plaintiff	)
v.	)
BRIAN S. COLLIER Defendant	)
v.	)
GARY HARROLD and CAROL HARROLD Third Party Defendants	)

Judge Raymond E. Leisy

FINDINGS OF FACT
CONCLUSION OF LAW
JUDGMENT ON OBJECTION

This matter comes on this day before the Court to rule on the objections filed by Brian Collier on May 23, 2003 to the Decision of the Magistrate of May 2, 2003. The Court finds the following facts:

1. Brian Collier filed an Objection to Magistrate's Decision and Request for Transcript on May 23, 2003. That Objection was filed within the 14-day requirement of Juvenile Rule 40(E)(3)(a). That objection did not dispute any finding of fact of the Magistrate. It sought substantive relief in the form of an objection to grandparent visitation rights. Further, it sought an overturn of the Magistrate's decision that the objection did not act as an automatic stay.

2. The Court ruled on May 13, 2003, that "Pending an objection to this decision and an appeal to the Court of Appeals, Ninth Judicial District, Gary and Carol Harrold are granted a temporary Order of Visitation pursuant to Local Rule 11 of the Wayne County Juvenile Court as outlined above. *There shall be no automatic stay* to a temporary Order of Visitation unless granted by the Court of Appeals, Ninth Judicial District." (Emphasis added).

3. June 10, 2003 was the 28th day from the May 13, 2003 Judgment Entry. However, on June 2, 2003, Gary and Carol Harrold filed a Motion for Contempt for the failure of Brian Collier to follow the May 9, 2003 interim order.

4. The Motion for Contempt was granted on July 16, 2003, and extended the interim Order of Visitation. The Judgment Entry ordered that "There shall be no automatic stay to this order unless granted by the Court of Appeals, Ninth Judicial District."

5. On July 16, 2003, the transcript of the May 2, 2003 hearing was filed with the Court.

6. On July 18, 2003, Gary and Carol Harrold filed a second Motion for Contempt. This Motion for Contempt was based on an allegation that Brian Collier violated the Judgment Entry of July 16, 2003. The second Motion for Contempt also sought an immediate imposition of sentence on the first contempt.

7. On August 27, 2003, Brian Collier filed a memorandum of support to his objections of May 23, 2003.

8. The Court set the second Motion for Contempt for hearing on August 28, 2003. The Magistrate's Decision of September 3, 2003 found Brian Collier in contempt and extended the Order of Visitation when the Decision stated, "There shall be no automatic stay to this order, unless granted by the Court of Appeals, Ninth Judicial District."

Conclusions of Law:

1. Juvenile Rule 40(E)(4)(c) states that, "the court may make an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. An interim order shall not be subject to the automatic stay caused by the filing of timely objections." Juvenile Rule 40(E)(4)(c) further provides that interim orders shall not extend more than 28 days from the date of its entry unless, within that time and for good cause shown, the court extends the interim order for an additional 28 days.

2. Procedurally, in ruling on objections to a magistrate's report, "[t]he court may adopt, reject or modify the

magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter itself." Juv.R. 40(E)(4)(b). The juvenile court is required to make an independent review of the magistrate's decision. The court, after reviewing the transcript of the proceedings before the magistrate, is free to disagree with the magistrate's conclusions and to enter an order it found to be in the child's best interest. See *In re Etter* (1998), 134 Ohio App.3d 484, 731 N.E.2d 694; *In re Wooldridge* (Aug. 27, 1999), 1st Dist. No. C-980545, 1999 WL 650615.

3. Local Rule 14 of the Rules of Court of Wayne County Court of Common Pleas, Juvenile Division, states that objecting parties have 15 days following the filing of the transcript to file a memorandum of support to the objections. As Brian Collier did not file his memorandum of support until August 27, 2003, it shall not be considered by the Court.

4. R.C. 3109.051(D) provides in determining whether to grant parenting time to a parent pursuant to this section or section 3109.12 of the Revised Code or companionship or *visitation rights to a grandparent*, relative, or other person pursuant to this section or section 3109.11 or 3109.12 of the Revised Code, in establishing a specific parenting time or visitation schedule, and in determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or section 3109.11 or 3109.12 of the Revised Code, the court shall consider all of the following factors:

> (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation

if that person is not a parent, sibling, or relative of the child;

(2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

(4) The age of the child;

(5) The child's adjustment to home, school, and community;

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matter, the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceedings; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has

acted in a manner resulting in a child being an abused child or a neglected child;
(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;
(14) Whether either parent has established a residence or is planning to establish a residence outside this state;
(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

With regard to the decision of the Magistrate to grant visitation to Mr. and Mrs. Harrold, maternal grandparents, the Court finds that R.C. 3109.11 and R.C. 3109.051 are controlling.

Brittany Collier was born on July 28, 1997 to Renee Harrold and Brian S. Collier, who were unmarried. Renee Harrold was suffering from cancer, and moved into her parents' home with her daughter, Brittany. The Harrolds took care of Renee until her death on October 10, 1999. Prior to that date, Renee Harrold and Brian Collier entered into a parenting agreement filed with this Court on June 2, 1998.

The Harrolds continued to care for Brittany in their home until an Appellate Decision awarded custody to Brian Collier and he removed Brittany from the Harrold home on July 31, 2002. Subsequently, the Harrolds filed a Motion for Visitation, which was heard by the Magistrate of this Court on May 2, 2003, and from which these Objections are taken.

In considering the factors in R.C. 2151.051(D), the Court finds that:

(1) The Harrolds had Brittany living in their home for almost five of her six years of life. Brittany is friends with and enjoys playing with a cousin, Heidi. Brittany's relationship with her maternal grandparents and cousin is significant and should not be broken.

(2) The grandparents and father both live in the city of Wooster. Travel is not a problem for Brittany.

(3) The visitation schedule is workable without affecting work schedules or vacation schedules.

(4) The child is of a very young age and the relationship with the grandparents needs to be maintained. The child has lost her mother, she should not lose her grandparents as well.

(5) The mental health of the child will not suffer by visitation. Neither will the child's adjustment to the home of her father, her schooling, or her community.

(6) The health and safety of Brittany will not be affected by visitation.

(7) No party to this action has pleaded guilty to any criminal offense involving a child.

(8) The father, Brian Collier, has made it perfectly clear that he does not wish visitation between Brittany and the grandparents. His wishes are to be considered, but the best interests of Brittany in maintaining a relationship with her grandparents outweigh that consideration. Brian Collier has stated on the record that he will resist visitation, which will

likely create confusion for Brittany, but that is outweighed by the relationship which she has with her grandparents.

In cases where a grandparent has sought visitation rights after a parent has died, courts in Ohio have generally applied the best interests standard and awarded visitation to the grandparent. See In re Dunn (1992), 79 Ohio App.3d 268, 607 N.E.2d 81; Bente v. Hill (1991), 73 Ohio App.3d 151, 596 N.E.2d 1042; In re Penington (1988), 55 Ohio App. 3d 99, 562 N.E.2d 905; Graziano v. David (1976) 50 Ohio App.2d 83, 361 N.E.2d 525. The Ohio legislature has gone even further recently in permitting the courts to uphold grandparent visitation even after a step-parent adoption. This legislation has been upheld by the courts. Lattanzio v. Lattanzio, No. 91-C-8 (7th District, Columbiana Co., 1992).

The question before the court now is has the standard changed in Ohio as a result of Troxel v. Granville (2000), 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49? The Court in Troxel, by a 6-3 decision upheld the Supreme Court of Washington State which overturned grandparent visitation for the parent of a deceased parent. The decision consisted of many separate opinions, but all agreed that grandparent visitation in such cases was not unfettered. Essentially, the consensus appears to be that a grandparent's right to visitation, over the objection of the parent, must be subject to strict scrutiny by the trial court so as to give deference to the wishes of a natural parent and minimize interference by third parties on how a parent can raise a child. The statute in Washington was found to be overbroad and is broader than the Ohio statute in that it permitted any person to petition for visitation.

The only Ohio Court to apply Troxel to R.C. 3109.051 and 3109.11 is Oliver v. Feldner (2002), 149 Ohio App.3d 114. Oliver is very similar to the facts in this matter. The

Court stopped short of declaring Ohio's statutes unconstitutional, but reversed the Trial Court on the facts. The Court applied the strict scrutiny test found in Troxel. The Court also applied the "special weight" requirement found in Troxel, in saying that a Court must "...determine that a compelling government interest is at stake." Oliver at 125.

Troxel did not define "special weight", but the Oliver Court found a definition in Rodrigues v. Hawaii (1984, 469 U.S. 1078, 1080, 105 S.Ct. 580, 83 L.Ed.2d 691 saying that it is "...a very strong term signifying deference." Oliver at 125. Essentially, a parent's wishes will be overcome only by a compelling state interest supported by overwhelmingly clear circumstances.

In cases such as this one, the court should only order visitation with a grandparent over the opposition of the parent when the court finds overwhelming evidence to support forcing visitation for the benefit of the child. It is presumed that the best interest of the child is the parent's wishes, absent a finding that the parent is unfit to make an informed decision.

Carol Harrold testified that, while Brittany lived with them, she developed a close relationship with her cousin, Haley, and her second cousins, Heidi and Melanie. She also developed close relationships with her preschool friends and church friends. (T-23). The rest of Mrs. Harrold's testimony concerned the Harrolds' attempt to deliver cards to Brittany and call Brittany. Since July, 2002, when Mr. Collier retrieved Brittany, he has not permitted any contact of any kind between the Harrolds and Brittany or any of the Harrold family, except for an accidental meeting between Brittany and Mrs. Harrold at Wal-Mart in March, 2003. (T-38). Mrs. Harrold spoke to Mr. Collier and requested visitation for

Easter. Brittany hugged her grandmother and spoke for a few minutes (T-39). Brittany neither cried or appeared to be happy. (T-39). The impression left with the Court is that this was a non-event for Brittany. The rest of the direct examination of Mrs. Harrold concerned child support issues and turning over personal belongings of Brittany to Mr. Collier.

Carol Collier, mother of Brian Collier, testified that Brittany appears happy and content and adjusted in the home of her son (T-47). In her interaction with Mrs. Harrold, she characterized Mrs. Harrold as a "...very violent, controlling, negative type person." (T-47, Line 21). She testified that, when the Harrolds had Brittany living in their home, there were harsh words between Brian Collier and Mrs. Harrold during visitation exchanges. (T-51).

Brian Collier testified that his relationship with Mrs. Harrold had not gone well during visitations when Brittany lived with the Harrolds. (T-60). At the end of one visitation, Mrs. Harrold threatened to sue Brian because he had Brittany's hair cut during a visitation. (T-60, Line 4). She also said that he would never see Brittany again. (T-60, Line 5). The main reason Mr. Collier wishes to deny visitation to the Harrolds is that, based on previous problems, he believes the Harrolds will use the visitation time to disparage Mr. Collier to Brittany. (T-62, Line 1).

The Court has found that all of the factors in R.C. 2151.051(D) would seem to support visitation with the grandparents over the objection of the father. But, we now have the decisions and guidance of Troxel and Oliver to consider. As much as this Court would like to encourage visitation between Brittany and her grandparents, there is insufficient proof in the record to find that there are

overwhelmingly clear circumstances to overrule the wishes of the parent, Brian Collier.

It is therefore ORDERED, ADJUDGED, AND DECREED

1. The automatic stay provisions of Juvenile Rule 40 (E)(4)(c) are inapplicable in that the Magistrate's Decision was an interim order and specifically provided that, "Pending an objection to this decision and an appeal to the Court of Appeals, Ninth Judicial District, Gary and Carol Harrold are granted a temporary Order of Visitation pursuant to Local Rule 11 of the Wayne County Juvenile Court as outlined above. There shall be no automatic stay to a temporary Order of Visitation unless granted by the Court of Appeals, Ninth Judicial District." (Emphasis added). Juvenile Rule 40(E)(4)(c) provides that an interim order shall not be stayed following the filing of timely objections.

2. The objections are sustained and the Motion for Visitation between the grandparents and Brittany is dismissed.

/s/_____
RAYMOND E. LEISY, JUDGE

APPENDIX D

IN THE COURT OF COMMON PLEAS,
JUVENILE DIVISION
WAYNE COUNTY, OHIO

CASE NO. 97-1440-PAR
I.D. NO. 32043

[Filed August 22, 2003]

RENEE HARROLD)
PLAINTIFF)
V.)
BRIAN COLLIER)
DEFENDANT)
)

JUDGE LEISY

JUDGMENT ENTRY

This matter comes on this day before the Court and for good cause shown it is hereby

ORDERED, ADJUDGED AND DECREED that Brian Collier is to be released forthwith from the Wayne County Jail.

/s/ _____
Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS
JUVENILE DIVISION
WAYNE COUNTY, OHIO

Case NO.97-1440-PAR
ID # 32043

[Filed May 9, 2003]

THE ESTATE OF RENEE HARROLD Plaintiff	)
v.	)
BRIAN S. COLLIER Defendant	)
v.	)
GARY HARROLD and CAROL HARROLD Third Party Defendants	)

FINDINGS & DECISION OF MAGISTRATE

This matter came on for a hearing on this 2nd day of May, 2003, upon the Motion for Visitation and Payment of Medical Expenses as filed by Renee Jackwood, counsel for Gary and

Carol Harrold; and the Motion to Terminate Support, Motion to Discharge Guardian Ad Litem and to Strike Guardian Ad Litem's Report, and other matters as filed by counsel for Brian Collier.

Present before the Magistrate were Gary and Carol Harrold with counsel, Renee Jackwood; and Brian Collier with counsel, Gregory Hail.

FINDINGS OF MAGISTRATE

1. Gregory Hail moved to withdraw the Motion to Discharge the Guardian Ad Litem. The report of the guardian ad litem was not stricken, but the Magistrate did not consider the report with regard to the matter of grandparent visitation.

2. Gregory Hail moved to withdraw the Motion to Terminate Support and Release Escrowed Monies. The Support Order against Brian Collier has been terminated and escrowed monies released.

3. The matters to be decided by the Magistrate are the following: grandparent visitation for Gary and Carol Harrold; payment of medical expenses; refund of child support as paid by Brian Collier; and return of personal belongings of Brittany Collier.

4. Brian Collier testified that the child, Brittany Collier, has resided with him since July 31, 2002. Mr. Collier removed the child from the home of Gary and Carol Harrold on the aforementioned date and has not permitted visitation of Brittany Collier with Gary and Carol Harrold.

5. Brian Collier requested a refund of child support from December, 2001 to July 31, 2002. Mr. Collier asserted that during the aforementioned time, the child should have resided with him pending the decision of the Court of Appeals, Ninth Judicial District (02CA0005), July 31, 2002. Gary and Carol Harrold had appealed the Wayne County Common Pleas Court, Juvenile Division and eight months elapsed before the Court of Appeals decision was issued.

6. Brian Collier received Social Security payments for Brittany Collier from January, 2002 to the present time. Mr. Collier was ordered to pay child support pending the decision of the Court of Appeals, Ninth Judicial District. He is requesting a return of the money as in the best interest of Brittany Collier. Mr. Collier had a support obligation of three thousand one hundred six dollars and 00/100 ($3,106.00). Mr. Collier failed to pay the child support as ordered. Mr. Collier had a child support arrearage as of July 31, 2002. Mr. Collier does not dispute that Brittany Collier was provided shelter, clothing, food, medical care, and pre-school by Gary and Carol Harrold.

7. Brian Collier testified that he did not pay uninsured medical expenses for the child when she was in the custody of Gary and Carol Harrold.

8. Brian Collier requested that the child's clothing and personal items be returned to him.

9. Brian Collier is opposed to grandparent visitation for Gary and Carol Harrold. Mr. Collier acknowledged that Brittany Collier was in the custody of Gary and Carol Harrold for approximately three years prior to July 31, 2002. Brittany Collier was five years of age on July 28, 2002. Mr. Collier acknowledged that Brittany desires to see a cousin, Heidi.

10. Brian Collier admitted that he created a "mess" when he took Brittany from Carol Harrold on July 31, 2002. Brittany was taken by Mr. Collier screaming and without shoes. Brittany cried for approximately 30 minutes after being removed from her grandmother. Mr. Collier testified that if visitation is ordered by the Wayne County Juvenile Court, he will appeal the same to the Court of Appeals, Ninth Judicial District. Mr. Collier testified that he would not cooperate if a Visitation Order is made by the Wayne County Juvenile Court.

11. Carol Harrold testified that she had a close relationship to Brittany Collier. Brittany resided with Mr. and Mrs. Harrold from October 12, 1999 to July 31, 2002. Further, Brittany enjoyed playing with a cousin, Heidi. The maternal grandparents and other family members, including Heidi, provided an important link to the child's deceased mother, Renee Harrold. The Magistrate finds that Gary and Carol Harrold have an interest in the welfare of the child and granting visitation with the grandparents is in the best interest of Brittany Collier (R.C. 3109.051).

12. Carol Harrold testified that she desires payment for uninsured medical expenses in the amount of four hundred sixty-three dollars and 26/100 ($463.26) due the Wooster Clinic and two hundred ninety-one dollars and 42/100 ($291.42) due The Counseling Center.

13. Mrs. Harrold testified that the clothes purchased for Brittany Collier have been passed to other grandchildren during the last year. Brittany had certain personal items and some clothes contained in a bag which could be given to Brian Collier. Finally, Mrs. Harrold testified that Barbie dolls, with which Brittany may have played, have been from Mrs.

Harrold's Barbie doll collection. Some dolls have been passed to other grandchildren.

14. Plaintiff's Exhibits A, B, C, D, E, F, G, H, and I were admitted into evidence without objection.

15. The actions of Brian Collier have not been in the best interest of his daughter, Brittany Collier. The Magistrate finds that the claim of Brian Collier for a refund of support from Gary and Carol Harrold is without merit. Brian Collier should be ordered to pay uninsured medical expenses of Brittany Collier in the amount of four hundred sixty-three dollars and 26/100 ($463.26) to the Wooster Clinic; two hundred ninety-one dollars and 42/100 ($291.42) to The Counseling Center; (Plaintiff's Exhibits B and C). The Magistrate would admonish Brian Collier to obey all orders of this Court and cooperate with grandparent visitation as ordered.

DECISION OF MAGISTRATE

The Motion for Grandparent Visitation is granted. Gary and Carol Harrold are granted visitation with Brittany Collier every other weekend from 6:00 p.m. Friday to 6:00 p.m. Sunday, beginning May 30, 2003. There shall be no mid-week visitation. The parties shall obey Local Rule 11 of the Wayne County Juvenile Court for visits at other times as provided in the basic visitation schedule. Gary and Carol Harrold shall provide all transportation for visits.

2. Brian Collier is ordered to pay uninsured medical expenses for Brittany Collier in the amount of four hundred sixty-three dollars and 26/100 ($463.26) (Wooster Clinic) and two hundred ninety-one dollars mad 42/100 ($291.42) (The Counseling Center). The above sums are to be paid through the office of Renee Jackwood on or before July 30, 2003.

3. No order for refund of support is made against Gary and Carol Harrold.

4. Carol Harrold is ordered to transfer the bag of clothes and personal items belonging to Brittany Collier to Renee Jackwood for transfer to Brian Collier.

5. Pending an objection to this decision and an appeal to the Court of Appeals, Ninth Judicial District, Gary and Carol Harrold are granted a temporary Order of Visitation pursuant to Local Rule 11 of the Wayne County Juvenile Court as outlined above. There shall be no automatic stay to a temporary Order of Visitation unless granted by the Court of Appeals, Ninth Judicial District.

/s/_____
Roger W. Kienzle, Jr., Magistrate

APPENDIX F

STATUTORY PROVISIONS INVOLVED

TITLE 31. DOMESTIC RELATIONS -- CHILDREN
CHAPTER 3109. CHILDREN
ORC Ann. 3109.11 (2005)

§ 3109.11. Companionship or visitation rights where parent is deceased

If either the father or mother of an unmarried minor child is deceased, the court of common pleas of the county in which the minor child resides may grant the parents and other relatives of the deceased father or mother reasonable companionship or visitation rights with respect to the minor child during the child's minority if the parent or other relative files a complaint requesting reasonable companionship or visitation rights and if the court determines that the granting of the companionship or visitation rights is in the best interest of the minor child. In determining whether to grant any person reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in division (D) of section 3109.051 [3109.05.1] of the Revised Code. Divisions (C), (K), and (L) of section 3109.051 [3109.05.1] of the Revised Code apply to the determination of reasonable companionship or visitation rights under this section and to any order granting any such rights that is issued under this section.

The remarriage of the surviving parent of the child or the adoption of the child by the spouse of the surviving parent of the child does not affect the authority of the court under this section to grant reasonable companionship or visitation rights with respect to the child to a parent or other relative of the child's deceased father or mother.

If the court denies a request for reasonable companionship or visitation rights made pursuant to this section and the complainant files a written request for findings of fact and conclusions of law, the court shall state in writing its findings of fact and conclusions of law in accordance with Civil Rule 52.

Except as provided in division (E)(6) of section 3113.31 of the Revised Code, if the court, pursuant to this section, grants any person companionship or visitation rights with respect to any child, it shall not require the public children services agency to provide supervision of or other services related to that person's exercise of companionship or visitation rights with respect to the child. This section does not limit the power of a juvenile court pursuant to Chapter 2151. of the Revised Code to issue orders with respect to children who are alleged to be abused, neglected, or dependent children or to make dispositions of children who are adjudicated abused, neglected, or dependent children or of a common pleas court to issue orders pursuant to section 3113.31 of the Revised Code.

HISTORY: 134 v H 163 (Eff 2-17-72); 143 v H 15 (Eff 5-31-90); 143 v S 3 (Eff 4-11-91); 146 v H 274 (Eff 8-8-96); 148 v S 180. Eff 3-22-2001.

ORC Ann. 3109.12 (2005)

§ 3109.12. Parenting time, companionship or visitation rights where mother is unmarried

(A) If a child is born to an unmarried woman, the parents of the woman and any relative of the woman may file a complaint requesting the court of common pleas of the county in which the child resides to grant them reasonable companionship or visitation rights with the child. If a child is born to an unmarried woman and if the father of the child has acknowledged the child and that acknowledgment has become final pursuant to section 2151.232 [2151.23.2], 3111.25, or 3111.821 [3111.82.1] of the Revised Code or has been determined in an action under Chapter 3111. of the Revised Code to be the father of the child, the father may file a complaint requesting that the court of appropriate jurisdiction of the county in which the child resides grant him reasonable parenting time rights with the child and the parents of the father and any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights with the child.

(B) The court may grant the parenting time rights or companionship or visitation rights requested under division (A) of this section, if it determines that the granting of the parenting time rights or companionship or visitation rights is in the best interest of the child. In determining whether to grant reasonable parenting time rights or reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in division (D) of section 3109.051 [3109.05.1] of the Revised Code. Divisions (C), (K), and (L) of section 3109.051 [3109.05.1] of the Revised Code apply to the determination of reasonable parenting time

rights or reasonable companionship or visitation rights under this section and to any order granting any such rights that is issued under this section.

The marriage or remarriage of the mother or father of a child does not affect the authority of the court under this section to grant the natural father reasonable parenting time rights or the parents or relatives of the natural father or the parents or relatives of the mother of the child reasonable companionship or visitation rights with respect to the child.

If the court denies a request for reasonable parenting time rights or reasonable companionship or visitation rights made pursuant to division (A) of this section and the complainant files a written request for findings of fact and conclusions of law, the court shall state in writing its findings of fact and conclusions of law in accordance with Civil Rule 52.

Except as provided in division (E)(6) of section 3113.31 of the Revised Code, if the court, pursuant to this section, grants parenting time rights or companionship or visitation rights with respect to any child, it shall not require the public children services agency to provide supervision of or other services related to that parent's exercise of parenting time rights with the child or that person's exercise of companionship or visitation rights with the child. This section does not limit the power of a juvenile court pursuant to Chapter 2151. of the Revised Code to issue orders with respect to children who are alleged to be abused, neglected, or dependent children or to make dispositions of children who are adjudicated abused, neglected, or dependent children or of a common pleas court to issue orders pursuant to section 3113.31 of the Revised Code.

HISTORY: 143 v H 15 (Eff 5-31-90); 143 v S 3 (Eff 4-11-91); 146 v H 274 (Eff 8-8-96); 147 v H 352 (Eff 1-1-98); 148 v S 180. Eff 3-22-2001.

ORC Ann. 3109.051 (2005)

§ 3109.051. Order granting parenting time or companionship or visitation rights

(A) If a divorce, dissolution, legal separation, or annulment proceeding involves a child and if the court has not issued a shared parenting decree, the court shall consider any mediation report filed pursuant to section 3109.052 [3109.05.2] of the Revised Code and, in accordance with division (C) of this section, shall make a just and reasonable order or decree permitting each parent who is not the residential parent to have parenting time with the child at the time and under the conditions that the court directs, unless the court determines that it would not be in the best interest of the child to permit that parent to have parenting time with the child and includes in the journal its findings of fact and conclusions of law. Whenever possible, the order or decree permitting the parenting time shall ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact by either parent with the child would not be in the best interest of the child. The court shall include in its final decree a specific schedule of parenting time for that parent. Except as provided in division (E)(6) of section 3113.31 of the Revised Code, if the court, pursuant to this section, grants parenting time to a parent or companionship or visitation rights to any other person with respect to any child, it shall not require the public children services agency to provide supervision of or other services related to that parent's exercise of parenting time or that person's exercise of companionship or visitation rights

with respect to the child. This section does not limit the power of a juvenile court pursuant to Chapter 2151. of the Revised Code to issue orders with respect to children who are alleged to be abused, neglected, or dependent children or to make dispositions of children who are adjudicated abused, neglected, or dependent children or of a common pleas court to issue orders pursuant to section 3113.31 of the Revised Code.

(B) (1) In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply:

(a) The grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights.

(b) The court determines that the grandparent, relative, or other person has an interest in the welfare of the child.

(c) The court determines that the granting of the companionship or visitation rights is in the best interest of the child.

(2) A motion may be filed under division (B)(1) of this section during the pendency of the divorce, dissolution of marriage, legal separation, annulment, or child support proceeding or, if a motion was not filed at that time or was filed at that time and the circumstances in the case have changed, at any time after a decree or final order is issued in the case.

(C) When determining whether to grant parenting time rights to a parent pursuant to this section or section 3109.12 of the Revised Code or to grant companionship or visitation rights to a grandparent, relative, or other person pursuant to this section or section 3109.11 or 3109.12 of the Revised Code, when establishing a specific parenting time or visitation schedule, and when determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or section 3109.11 or 3109.12 of the Revised Code, the court shall consider any mediation report that is filed pursuant to section 3109.052 [3109.05.2] of the Revised Code and shall consider all other relevant factors, including, but not limited to, all of the factors listed in division (D) of this section. In considering the factors listed in division (D) of this section for purposes of determining whether to grant parenting time or visitation rights, establishing a specific parenting time or visitation schedule, determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or under section 3109.11 or 3109.12 of the Revised Code, and resolving any issues related to the making of any determination with respect to parenting time or visitation rights or the establishment of any specific parenting time or visitation schedule, the court, in its discretion, may interview in chambers any or all involved children regarding their wishes and concerns. If the court interviews any child concerning the child's wishes and concerns regarding those parenting time or visitation matters, the interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview. No person shall obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the wishes and concerns of the child

regarding those parenting time or visitation matters. A court, in considering the factors listed in division (D) of this section for purposes of determining whether to grant any parenting time or visitation rights, establishing a parenting time or visitation schedule, determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or under section 3109.11 or 3109.12 of the Revised Code, or resolving any issues related to the making of any determination with respect to parenting time or visitation rights or the establishment of any specific parenting time or visitation schedule, shall not accept or consider a written or recorded statement or affidavit that purports to set forth the child's wishes or concerns regarding those parenting time or visitation matters.

(D) In determining whether to grant parenting time to a parent pursuant to this section or section 3109.12 of the Revised Code or companionship or visitation rights to a grandparent, relative, or other person pursuant to this section or section 3109.11 or 3109.12 of the Revised Code, in establishing a specific parenting time or visitation schedule, and in determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or section 3109.11 or 3109.12 of the Revised Code, the court shall consider all of the following factors:

(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;

(2) The geographical location of the residence of each parent and the distance between those residences, and if the

person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

(4) The age of the child;

(5) The child's adjustment to home, school, and community;

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested

companionship or visitation, the willingness of that person to reschedule missed visitation;

(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child;

(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

(16) Any other factor in the best interest of the child.

(E) The remarriage of a residential parent of a child does not affect the authority of a court under this section to grant parenting time rights with respect to the child to the parent who is not the residential parent or to grant reasonable companionship or visitation rights with respect to the child to any grandparent, any person related by consanguinity or affinity, or any other person.

(F) (1) If the court, pursuant to division (A) of this section, denies parenting time to a parent who is not the residential parent or denies a motion for reasonable companionship or visitation rights filed under division (B) of this section and the parent or movant files a written request for findings of fact and conclusions of law, the court shall state in writing its findings of fact and conclusions of law in accordance with Civil Rule 52.

(2) On or before July 1, 1991, each court of common pleas, by rule, shall adopt standard parenting time guidelines. A court shall have discretion to deviate from its standard

parenting time guidelines based upon factors set forth in division (D) of this section.

(G) (1) If the residential parent intends to move to a residence other than the residence specified in the parenting time order or decree of the court, the parent shall file a notice of intent to relocate with the court that issued the order or decree. Except as provided in divisions (G)(2), (3), and (4) of this section, the court shall send a copy of the notice to the parent who is not the residential parent. Upon receipt of the notice, the court, on its own motion or the motion of the parent who is not the residential parent, may schedule a hearing with notice to both parents to determine whether it is in the best interest of the child to revise the parenting time schedule for the child.

(2) When a court grants parenting time rights to a parent who is not the residential parent, the court shall determine whether that parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child. If the court determines that that parent has not been so convicted and has not been determined to be the perpetrator of an abusive act that is the basis of a child abuse adjudication, the court shall issue an order stating that a copy of any notice of relocation that is filed with the court pursuant to division (G)(1) of this section will be sent to the parent who

is given the parenting time rights in accordance with division (G)(1) of this section.

If the court determines that the parent who is granted the parenting time rights has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, it shall issue an order stating that that parent will not be given a copy of any notice of relocation that is filed with the court pursuant to division (G)(1) of this section unless the court determines that it is in the best interest of the children to give that parent a copy of the notice of relocation, issues an order stating that that parent will be given a copy of any notice of relocation filed pursuant to division (G)(1) of this section, and issues specific written findings of fact in support of its determination.

(3) If a court, prior to April 11, 1991, issued an order granting parenting time rights to a parent who is not the residential parent and did not require the residential parent in that order to give the parent who is granted the parenting time rights notice of any change of address and if the residential parent files a notice of relocation pursuant to division (G)(1) of this section, the court shall determine if the parent who is granted the parenting time rights has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of

the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child. If the court determines that the parent who is granted the parenting time rights has not been so convicted and has not been determined to be the perpetrator of an abusive act that is the basis of a child abuse adjudication, the court shall issue an order stating that a copy of any notice of relocation that is filed with the court pursuant to division (G)(1) of this section will be sent to the parent who is granted parenting time rights in accordance with division (G)(1) of this section.

If the court determines that the parent who is granted the parenting time rights has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, it shall issue an order stating that that parent will not be given a copy of any notice of relocation that is filed with the court pursuant to division (G)(1) of this section unless the court determines that it is in the best interest of the children to give that parent a copy of the notice of relocation, issues an

order stating that that parent will be given a copy of any notice of relocation filed pursuant to division (G)(1) of this section, and issues specific written findings of fact in support of its determination.

(4) If a parent who is granted parenting time rights pursuant to this section or any other section of the Revised Code is authorized by an order issued pursuant to this section or any other court order to receive a copy of any notice of relocation that is filed pursuant to division (G)(1) of this section or pursuant to court order, if the residential parent intends to move to a residence other than the residence address specified in the parenting time order, and if the residential parent does not want the parent who is granted the parenting time rights to receive a copy of the relocation notice because the parent with parenting time rights has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, the residential parent may file a motion with the court requesting that the parent who is granted the parenting time rights not receive a copy of any notice of relocation. Upon the filing of the motion, the court shall schedule a hearing on the motion and give both parents notice of the date, time, and location of the hearing. If the court determines that the parent who is granted the parenting time rights has been so convicted or has been determined to be the perpetrator of an abusive act that is the basis of a child abuse adjudication, the court shall

issue an order stating that the parent who is granted the parenting time rights will not be given a copy of any notice of relocation that is filed with the court pursuant to division (G)(1) of this section or that the residential parent is no longer required to give that parent a copy of any notice of relocation unless the court determines that it is in the best interest of the children to give that parent a copy of the notice of relocation, issues an order stating that that parent will be given a copy of any notice of relocation filed pursuant to division (G)(1) of this section, and issues specific written findings of fact in support of its determination. If it does not so find, it shall dismiss the motion.

(H) (1) Subject to section 3125.16 and division (F) of section 3319.321 [3319.32.1] of the Revised Code, a parent of a child who is not the residential parent of the child is entitled to access, under the same terms and conditions under which access is provided to the residential parent, to any record that is related to the child and to which the residential parent of the child legally is provided access, unless the court determines that it would not be in the best interest of the child for the parent who is not the residential parent to have access to the records under those same terms and conditions. If the court determines that the parent of a child who is not the residential parent should not have access to records related to the child under the same terms and conditions as provided for the residential parent, the court shall specify the terms and conditions under which the parent who is not the residential parent is to have access to those records, shall enter its written findings of facts and opinion in the journal, and shall issue an order containing the terms and conditions to both the residential parent and the parent of the child who is not the residential parent. The court shall include in every order issued pursuant to this division notice that any keeper of a

record who knowingly fails to comply with the order or division (H) of this section is in contempt of court.

(2) Subject to section 3125.16 and division (F) of section 3319.321 [3319.32.1] of the Revised Code, subsequent to the issuance of an order under division (H)(1) of this section, the keeper of any record that is related to a particular child and to which the residential parent legally is provided access shall permit the parent of the child who is not the residential parent to have access to the record under the same terms and conditions under which access is provided to the residential parent, unless the residential parent has presented the keeper of the record with a copy of an order issued under division (H)(1) of this section that limits the terms and conditions under which the parent who is not the residential parent is to have access to records pertaining to the child and the order pertains to the record in question. If the residential parent presents the keeper of the record with a copy of that type of order, the keeper of the record shall permit the parent who is not the residential parent to have access to the record only in accordance with the most recent order that has been issued pursuant to division (H)(1) of this section and presented to the keeper by the residential parent or the parent who is not the residential parent. Any keeper of any record who knowingly fails to comply with division (H) of this section or with any order issued pursuant to division (H)(1) of this section is in contempt of court.

(3) The prosecuting attorney of any county may file a complaint with the court of common pleas of that county requesting the court to issue a protective order preventing the disclosure pursuant to division (H)(1) or (2) of this section of any confidential law enforcement investigatory record. The court shall schedule a hearing on the motion and give notice of the date, time, and location of the hearing to all parties.

(I) A court that issues a parenting time order or decree pursuant to this section or section 3109.12 of the Revised Code shall determine whether the parent granted the right of parenting time is to be permitted access, in accordance with section 5104.011 [5104.01.1] of the Revised Code, to any child day-care center that is, or that in the future may be, attended by the children with whom the right of parenting time is granted. Unless the court determines that the parent who is not the residential parent should not have access to the center to the same extent that the residential parent is granted access to the center, the parent who is not the residential parent and who is granted parenting time rights is entitled to access to the center to the same extent that the residential parent is granted access to the center. If the court determines that the parent who is not the residential parent should not have access to the center to the same extent that the residential parent is granted such access under division (C) of section 5104.011 [5104.01.1] of the Revised Code, the court shall specify the terms and conditions under which the parent who is not the residential parent is to have access to the center, provided that the access shall not be greater than the access that is provided to the residential parent under division (C) of section 5104.011 [5104.01.1] of the Revised Code, the court shall enter its written findings of fact and opinions in the journal, and the court shall include the terms and conditions of access in the parenting time order or decree.

(J) (1) Subject to division (F) of section 3319.321 [3319.32.1] of the Revised Code, when a court issues an order or decree allocating parental rights and responsibilities for the care of a child, the parent of the child who is not the residential parent of the child is entitled to access, under the same terms and conditions under which access is provided to the residential parent, to any student activity that is related to the child and to which the residential parent of the child legally

is provided access, unless the court determines that it would not be in the best interest of the child to grant the parent who is not the residential parent access to the student activities under those same terms and conditions. If the court determines that the parent of the child who is not the residential parent should not have access to any student activity that is related to the child under the same terms and conditions as provided for the residential parent, the court shall specify the terms and conditions under which the parent who is not the residential parent is to have access to those student activities, shall enter its written findings of facts and opinion in the journal, and shall issue an order containing the terms and conditions to both the residential parent and the parent of the child who is not the residential parent. The court shall include in every order issued pursuant to this division notice that any school official or employee who knowingly fails to comply with the order or division (J) of this section is in contempt of court.

(2) Subject to division (F) of section 3319.321 [3319.32.1] of the Revised Code, subsequent to the issuance of an order under division (J)(1) of this section, all school officials and employees shall permit the parent of the child who is not the residential parent to have access to any student activity under the same terms and conditions under which access is provided to the residential parent of the child, unless the residential parent has presented the school official or employee, the board of education of the school, or the governing body of the chartered nonpublic school with a copy of an order issued under division (J)(1) of this section that limits the terms and conditions under which the parent who is not the residential parent is to have access to student activities related to the child and the order pertains to the student activity in question. If the residential parent presents the school official or employee, the board of education of the school, or the

governing body of the chartered nonpublic school with a copy of that type of order, the school official or employee shall permit the parent who is not the residential parent to have access to the student activity only in accordance with the most recent order that has been issued pursuant to division (J)(1) of this section and presented to the school official or employee, the board of education of the school, or the governing body of the chartered nonpublic school by the residential parent or the parent who is not the residential parent. Any school official or employee who knowingly fails to comply with division (J) of this section or with any order issued pursuant to division (J)(1) of this section is in contempt of court.

(K) If any person is found in contempt of court for failing to comply with or interfering with any order or decree granting parenting time rights issued pursuant to this section or section 3109.12 of the Revised Code or companionship or visitation rights issued pursuant to this section, section 3109.11 or 3109.12 of the Revised Code, or any other provision of the Revised Code, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt, and may award reasonable compensatory parenting time or visitation to the person whose right of parenting time or visitation was affected by the failure or interference if such compensatory parenting time or visitation is in the best interest of the child. Any compensatory parenting time or visitation awarded under this division shall be included in an order issued by the court and, to the extent possible, shall be governed by the same terms and conditions as was the parenting time or visitation that was affected by the failure or interference.

(L) Any parent who requests reasonable parenting time rights with respect to a child under this section or section 3109.12 of the Revised Code or any person who requests reasonable companionship or visitation rights with respect to a child under this section, section 3109.11 or 3109.12 of the Revised Code, or any other provision of the Revised Code may file a motion with the court requesting that it waive all or any part of the costs that may accrue in the proceedings. If the court determines that the movant is indigent and that the waiver is in the best interest of the child, the court, in its discretion, may waive payment of all or any part of the costs of those proceedings.

(M) The juvenile court has exclusive jurisdiction to enter the orders in any case certified to it from another court.

(N) As used in this section:

(1) "Abused child" has the same meaning as in section 2151.031 [2151.03.1] of the Revised Code, and "neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(2) "Record" means any record, document, file, or other material that contains information directly related to a child, including, but not limited to, any of the following:

(a) Records maintained by public and nonpublic schools;

(b) Records maintained by facilities that provide child care, as defined in section 5104.01 of the Revised Code, publicly funded child care, as defined in section 5104.01 of the Revised Code, or pre-school services operated by or

under the supervision of a school district board of education or a nonpublic school;

(c) Records maintained by hospitals, other facilities, or persons providing medical or surgical care or treatment for the child;

(d) Records maintained by agencies, departments, instrumentalities, or other entities of the state or any political subdivision of the state, other than a child support enforcement agency. Access to records maintained by a child support enforcement agency is governed by section 3125.16 of the Revised Code.

(3) "Confidential law enforcement investigatory record" has the same meaning as in section 149.43 of the Revised Code.

HISTORY: 143 v H 15 (Eff 5-31-90); 143 v S 3 (Eff 4-11-91); 144 v H 155 (Eff 7-22-91); 146 v H 274 (Eff 8-8-96); 147 v H 408 (Eff 10-1-97); 148 v S 180. Eff 3-22-2001; 150 v H 11, § 1, eff. 5-18-05.